Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the matter of	)	
	)	
Applications of Comcast Corporation,	)	MB Dkt. No. 10-56
General Electric Company and NBC	)	
Universal Inc., for Consent to Assign	)	
Licenses or Transfer Control of Licenses	)	

STATEMENT OF PROFESSOR JAMES B. SPETA
AT THE CHICAGO PUBLIC FORUM

Thank you, Commissioner Copps and Mr. Lake, for the opportunity to participate here. The proposed transaction is, of course, a significant merger in a significant market, but to my mind its fundamentals are hardly unprecedented. We have already seen combinations of content providers; we have already seen mergers of distribution entities; and we have already seen combinations of content and distribution. To be sure, the scale and scope of this transaction are great, but I do not believe that it is necessary for the Commission to re-write video policy simply to evaluate this deal. And, in fact, most of the challenges to the transaction strike me as either capable of straightforward competition analysis – a matter on which the Commission should defer to the antitrust authorities – or more properly the subject of industry-wide proceedings.

I am not retained by any party in the transaction, nor by any party challenging the transaction – nor, in fact, by any party in an affected communications industry.[1] My comments therefore are based on my research and history in communications study. I am a professor here at the Northwestern University School of Law, and have, for my 12 years here, focused my research on questions of communications policy and market structure.[2]

[1] And, of course, my comments do not reflect any views of Northwestern University (if any it has).
[2] I have previously published a short paper on the transaction, with the Technology Policy Institute: James Speta, *Simplifying and Screening the Competition Arguments in the NBC/Comcast Transaction* (Tech. Pol'y Inst. May 10, 2010) (available at: http://www.techpolicyinstitute.org/files/nbc_comcast_speta.pdf).

Overall, the transaction strikes me as an appropriate and interesting response to a marketplace in complete turmoil – one in which the technology, the business models, and even the consumer preferences are rapidly changing. It is hard to overstate the magnitude of these changes, changes that call into question the Communications Act's premise that video needs special regulation.

I wish to make three general points in opening, and will be happy to elaborate on them in the discussion. First, several challenges to the merger that are being presented as competition arguments are not, in fact, competition arguments in the sense of presenting anticompetitive effects that harm consumers. Second, the genuine competition arguments in the merger can be dealt with through customary antitrust analysis that focuses on the limited horizontal aspects of the merger. Third, many of the media-specific issues being raised in connection with the merger are really general questions of market structure or of regulatory design, and these are already the subject of general FCC proceedings, or they should be.

First, the merger has been challenged from some quarters on the grounds that the newly merged entity will be able to offer products and services that other media companies will not be able to duplicate. For example, some have worried that NBC/Comcast, because of the breadth of its content, distribution, and Internet properties, may be able to offer advertising packages that other market participants, such as independent broadcasters, may not be able to duplicate.[3] But the merged company's ability to offer new products and services is a benefit of the merger, not a harm. If participants in the advertising market find such bundling valuable, then the merger is pro-consumer, not anti-consumer, even if the competitors of the merged companies must find

[3] *E.g.*, Testimony of Dr. Mark Cooper, before the Senate Commerce Committee, "Consumers, Competition and Consolidation in the Video Broadband Market," March 11, 2010, at 4-5 (available at: http://commerce.senate.gov/public/?a=Files.Serve&File_id=e6645c9b-71a8-4b9a-9552-dd0dafd0ba46) ("A standalone broadcaster will not be able to offer package deals and volume discounts for advertising across multiple channels the way that Comcast/NBC will be able to do post-merger.").

new ways to compete.[4] Similarly, worries that the merged company will deploy new Internet products, allowing consumers to watch video online in different ways, or deploy new interactive advertising technologies, must separate out anticompetitive from precompetitive effects. If the merger allows the combined company to innovate, in general those innovations will benefit consumers – even if they force other media companies to change their business practices or suffer declines in their own businesses. To be sure, moving content online could be a way to circumvent program access rules (on which more below) and enable certain foreclosure strategies. But an analysis of these possibilities must go beyond a functional description, beyond a claim that the merger will enable NBC/Comcast to do new things. One of the possible benefits of the transaction is that it could cut through thickets of legacy rights, which create high transactions costs and can prevent innovation.

Second, some arguments concerning the merger, of course, do fit a classic competition analysis – such as concerns that NBC/Comcast will have market power in content, or in distribution, and will use that market power to the detriment of its customers or to foreclose its competitors. But each of these arguments depends on making one of two findings – either that one of the companies currently has market power in either content or distribution *and* that the transaction will make the exercise of that market power relevantly anticompetitive, *or* that the transaction will create market power where currently there is none. (Arguments that one of the parties currently has market power, such as that NBC has "must have" content, standing alone, do not present a reason to reject the merger.)

One must take seriously the arguments being made in this regard, but, these are straightforward applications of customary merger analysis – that is, the existence or acquisition

[4] *Compare* Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 116 (1986) (rejecting argument that antitrust laws protected competitors to merging companies from efficiencies gained by the merger, for that was "vigorous competition").

of market power in horizontal markets. Even the arguments concerning the use of content to effect foreclosure depend on finding that the combined entity will have market power over content sufficient to effect the strategy. This is a matter on which the Commission can and should defer to the antitrust authorities' review.

Personally, I am skeptical of the foreclosure claims, although I cannot judge the matter definitively without access to data. I am skeptical because, with one possible exception, the horizontal aspects of the merger do not seem terribly significant. At the distribution level, it is true that, in some markets, NBC has owned and operated stations, either NBC or Telemundo broadcasters. But we know that only a small percentage of the U.S. population watches television over the air,[5] and we know that only a minority of broadcasters rely on must-carry rights. As a result, the merger would seem to create only a small increase in the combined entity's control over distribution outlets. At the content level, Comcast's national cable networks are not currently big players. The principal focus, then, is the areas where Comcast owns a regional sports network. But even in those areas, the analysis must be cautious. It could be that both broadcast network and regional sports network content are so-called "must have" content, but the merger does not combine the only two sources of "must have" content – and therefore the analysis must be more nuanced. On the one hand, the transaction does combine some significant NBC sports programming with the RSNs. On the other hand, the NBC sports programming does not appear to me to grow out of the ownership of underlying assets, such as teams or arenas, and therefore one can expect the owners of the content that NBC licenses to attend to their interests in maximum distribution, at least over the long run. Moreover, it may be the case that the

[5] *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Twelfth Annual Report*, FCC No. 06-11, at ¶¶ 10-11, 30 (March 3, 2006) (reporting that nearly 90% of households subscribe to an MVPD).

absence of some "must have" content can be addressed by other distributors through exclusive deals to carry "must have" content of their own.

Third, the foregoing naturally flows into a discussion of the Commission's program access rules and whether they are adequate to address instances of possible foreclosure. Here, I think that much of the discussion addresses issues that are general to the industry, and therefore should not give rise to specific merger conditions – unless of course some merger-specific harm is being remedied. The FCC has a proceeding on the program access rules, in which it has already taken the significant step of "closing the terrestrial loophole."[6] It is possible that other general improvements could be made: such as rules or mechanisms to avoid sudden terminations of programming and measures to make the complaint cycle faster and cheaper. But, even here, there should be a recognition that the retransmission consent and program access issues operate in a broader context, one in which the broadcasters are given significant regulatory position in negotiations, through back-up must carry rights, rights to channel placement, and geographic exclusivity rights.

This transaction, due to its size and the historical importance of NBC, does create an opportunity to rethink our approach to video policy. But, I believe that the transaction approval itself is not a vessel for that rethinking. Instead, the transaction should be evaluated under a traditional competition analysis, and broader issues should be addressed in broader, industry-wide proceedings. I do not mean to suggest that the merger presents no possible competition issues; I take no ultimate position on the few that I have identified above. But some of the concerns are either concerns that innovation is bad because it changes market structures, which

[6] In the Matter of Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements, First Report and Order, 25 FCC Rcd. 746 (2010).

to my mind is not a reason to reject the merger, or are concerns that apply to our rapidly changing media environment more generally.

I thank you for the time.

Respectfully submitted,

By: /s/_____
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